McGeorge Law Review

Volume 34 | Issue 4 Article 4

1-1-2003

Applying Atkins v. Virginia to Juvenile Defendants: The End is Near for the Constitutionality of Executing Juveniles

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I. INTRODUCTION

For two months a pair of snipers terrorized the metropolitan areas surrounding Washington D.C. When the pair was finally arrested on October 24, 2002, they were suspected of fatally shooting a total of fourteen people.[1] Because the shootings occurred in several states and the District of Columbia, state and federal prosecutors had to lobby Attorney General John Ashcroft for the right to try the pair first.[2] Ashcroft chose Virginia because of its strong death penalty

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1. Cam Simpson, *Virginia Gets First Crack at Sniper Trials*, CHI. TRIB., Nov. 8, 2002, at A1.

2. *Id.*

record[3] and because Virginia law allows execution for seventeen-year-old juvenile[4] defendants.[5]

One of the suspected snipers, John Malvo, was seventeen years old when he was arrested.[6] Under current law, it is not unconstitutional to execute persons who were juveniles at the time of committing their crime.[7] Therefore, as Malvo's trial approaches, he is subject to the death penalty if convicted.[8] I will argue, however, that the Supreme Court will grant certiorari to a juvenile defendant like Malvo and hold that executing juveniles violates the Eighth Amendment of the United States Constitution. Such a decision will be in line with the Court's decision in *Atkins v. Virginia*[9] and with the emerging "national consensus" against executing juveniles.

On June 20, 2002, the United States Supreme Court held that executing mentally retarded criminals was unconstitutional,[10] violating the Eighth Amendment's proscription of cruel and unusual punishment.[11] This categorical rule, forbidding the execution of all mentally retarded criminals, marked a sharp departure from the Supreme Court's 1989 decision in *Penry v. Lynaugh*,[12] which declined to hold that, as a categorical rule, it was unconstitutional to execute the mentally retarded.[13]

The Court decided *Stanford v. Kentucky*[14] on the same day as it decided *Penry*,[15] and declined to adopt a categorical rule banning the execution of juveniles under the age of eighteen.[16] Although willing to hold sixteen as the minimum age for execution a year earlier,[17] the Court declined the opportunity to

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3. *See id.* (stating that only Texas has executed more people than Virginia since capital punishment was reinstated by the United States Supreme Court).

4. The term "juvenile" refers to a person who is under the age of eighteen.

5. CBSNews.com, *Sniper Suspects in Va. Courtrooms*, Nov. 8, 2002, *at* http://www.cbsnews.com/stories/2002/11/08/national/printable528765.shtml (last visited Oct. 18, 2002) (copy on file with the *McGeorge Law Review*).

6. Simpson, *supra* note 1, at A1.

7. *See* Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (holding that sixteen is the minimum age for executing juveniles); Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (holding state statutes which permit execution of sixteen and seventeen-year-old juveniles constitutional).

8. *See* Simpson, *supra* note 1, at A1 (stating that the death penalty was a "key factor" in Ashcroft's decision to let Virginia prosecute Malvo first).

9. 536 U.S. 304 (2002).

10. *Id.* at 321.

11. U.S. CONST. amend. VIII.

12. 492 U.S. 302 (1989).

13. *Id.* at 335.

14. 492 U.S. 361 (1989).

15. *See id.*; *Penry*, 492 U.S. at 302 (indicating that both cases were decided on June 26, 1989).

16. *See Stanford*, 492 U.S. at 380 (noting that no historical or modern societal consensus prohibited executions of sixteen or seventeen-year-olds).

17. *See* Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (holding that "the Eighth and Fourteenth Amendments prohibit the execution of a person" under sixteen at the time of the commission of the offense).

raise that age to eighteen in *Stanford*.[18] Therefore, as of 1989, the Court was unwilling to establish categorical rules proscribing the execution of the mentally retarded and juveniles aged sixteen and seventeen under the Eighth Amendment.[19]

In this Comment I will argue that the Supreme Court will follow suit with its decision in *Atkins v. Virginia*[20] and, upon granting certiorari for a defendant in a state court, apply its reasoning in *Atkins* to hold that executing juveniles under the age of eighteen is unconstitutional as "cruel and unusual punishment," thus violating the Eighth Amendment.

I will begin with a discussion of the legal background of the Eighth Amendment issue, focusing mainly on *Atkins* and *Stanford*. Included will be a brief discussion of the Supreme Court's recent denial of a writ of habeas corpus from the original petitioner in *Stanford*.[21] Next will be a discussion of Justice O'Connor's key "swing vote" on the Court and a look at her significant concurring opinion in *Thompson v. Oklahoma*. Then I will examine whether a "national consensus" against executing juveniles exists. Finally, I will apply the appropriate test, as set out by Justice O'Connor's concurrence in *Thompson*, and argue that, in light of *Atkins*, the Supreme Court will find the national consensus that it did not find in *Stanford*, causing the Court to hold that juveniles as a class lack the requisite culpability to be executed in accord with the Eighth Amendment.

II. LEGAL BACKGROUND

A. Penry v. Lynaugh

Johnny Paul Penry was convicted of murdering Pamela Carpenter in 1979.[22] Penry brutally beat, raped, and stabbed Carpenter.[23] He was convicted of murder and sentenced to death.[24] The jury rejected his insanity defense in both the guilt and sentencing phases of the trial.[25] Penry, whose IQ measured between fifty and sixty-three over several years,[26] filed a writ of habeas corpus and was denied

18. *Stanford*, 492 U.S. at 380.

19. *Id.*; *Penry*, 492 U.S. at 340.

20. 536 U.S. 304 (2002).

21. *In re* Stanford, 537 U.S. 1097 (2002).

22. *Penry*, 492 U.S. at 307, 310.

23. *Id.* at 307.

24. *Id.* at 310-11.

25. *Id.* at 310.

26. *See id.* at 308 (stating that a person with an IQ in this range is considered mildly to moderately mentally retarded).

relief in both the district court and the Fifth Circuit Court of Appeals.[27] The United States Supreme Court granted certiorari.[28]

Justice O'Connor, writing the opinion of the Court, held that the Eighth Amendment did not prohibit Penry's execution because a national consensus against such action did not exist.[29] At the time of the *Penry* decision in 1989, only Georgia and Maryland had banned the execution of the mentally retarded.[30] Therefore, in not finding a consensus, the Court did not disturb Penry's death sentence by denying him habeas corpus.[31]

B. Atkins v. Virginia

Daryl Renard Atkins was convicted of murdering Eric Nesbitt in 1996.[32] Atkins and an accomplice kidnapped Nesbitt, drove him to an ATM machine, robbed him, drove him to a remote field, and shot him eight times.[33] Atkins had an IQ of fifty-nine.[34] He was subsequently convicted of capital murder and sentenced to death in 1998.[35] He appealed the sentence on numerous grounds, including an argument that the Virginia death penalty statute was unconstitutional.[36] His sentence was reversed due to the inadequacy of the jury form used in sentencing.[37] On remand, Atkins was again sentenced to death, and this time the Supreme Court of Virginia affirmed the sentence.[38] Following the Supreme Court of Virginia's second decision, the United States Supreme Court granted certiorari.[39]

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27. *Id.* at 312.
28. *See id.* at 313.
29. *Id.* at 340 (noting that a national consensus against executing the mentally retarded may emerge in the future, foreshadowing the *Atkins* decision).
30. *Id.* at 334.
31. *Id.* at 340.
32. Atkins v. Virginia, 536 U.S. 304, 307 (2002).
33. *Id.*
34. *Id.* at 309.
35. Atkins v. Commonwealth, 510 S.E.2d 445, 453 (Va. 1999).
36. *Id.*
37. *Id.* at 457.
38. Atkins v. Commonwealth, 534 S.E.2d 312, 314 (Va. 2000).
39. Atkins v. Virginia, 536 U.S. 304, 310 (2002).

1. *The Supreme Court's Reasoning in* Atkins

Writing for a 6-3 Court,[40] Justice Stevens laid out the appropriate standard as follows: The Eighth Amendment prohibits excessive sanctions[41] and in determining what is "excessive," the Court must apply a precept of proportionality to determine whether the crime committed is punished in proportion to the harm it caused.[42] According to the Court, the only required inquiry into proportionality is under currently prevailing standards.[43] This is known as the "evolving standards of decency" test[44] and is measured, as much as possible, by "objective factors" which tend to show a "national consensus" against a particular type of punishment.[45]

The test, therefore, is whether a national consensus exists.[46] This is an objective test, and the most important objective factor, agreed upon by all members of the Court, is the legislation promulgated by the states.[47] This inquiry into state legislation is the most reliable guide for the Court to determine whether a "national consensus" exists favoring the prohibition of executing certain groups.[48]

Beyond the objective inquiry into state legislation, however, there is disagreement as to whether subjective views of the Justices should factor into the more general evolving standards of decency test.[49] According to the *Atkins* majority, it is the job of the Court to determine whether other reasons exist for following or disregarding the presence of a national consensus.[50] These reasons include analysis under the two death penalty rationales: deterrence and

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40. *See id.* at 306 (commencing Justice Stevens's opinion for the majority); *id.* at 321 (Rehnquist, C.J., dissenting) (commencing the dissenting opinions by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas).

41. *Id.* at 311. In addition, the Eighth Amendment prohibits cruel and unusual punishments regardless of whether they are excessive. *Id.* at 311 n.7.

42. *Id.* at 311-12.

43. *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (Warren, C.J., plurality opinion)).

44. *Id.*

45. *See id.* at 312 (stating that "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures'" (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989))).

46. This is the same "national consensus" test as the one applied in *Penry*. *See supra* Part II.A.

47. *Atkins*, 536 U.S. at 312; *see also id.* at 340 (Scalia, J., dissenting) (discussing legislation as the most important objective factor); Stanford v. Kentucky, 492 U.S. 361, 370 (1989) (discussing legislation as being the foremost objective indicator of public opinion); Penry v. Lynaugh, 492 U.S. 302, 331 (1989) (looking first to state legislatures as evidence of a national consensus).

48. *See supra* note 44 and accompanying text (including the Court's statement asserting that legislation is the primary indicator of the nation's values).

49. *See Atkins*, 536 U.S. at 348-49 (Scalia, J., dissenting) (arguing that there is no precedent or authority for the Court to act on its agreement or disagreement with a "national consensus" of state legislatures).

50. *Id.* at 313.

retribution.[51] Purporting to find such a consensus, the majority did not base its holding exclusively on "subjective intentions."[52]

2. National Consensus Exists

In 1989, when *Penry v. Lynaugh* was decided, only two death penalty states categorically prohibited the execution of mentally retarded inmates.[53] Consequently, the Court concluded that a national consensus against executing mentally retarded inmates did not exist.[54]

Since *Penry*, however, sixteen states have adopted statutes that ban the execution of mentally retarded inmates.[55] Therefore, at the time of the *Atkins* decision, eighteen of the thirty-eight death penalty states prohibited the execution of the mentally retarded.[56] This state legislative reaction to *Penry* was a large factor in the Court's national consensus analysis in *Atkins*.[57]

The Court was also persuaded by the fact that, in the thirteen years between *Penry* and *Atkins*, no state that had banned execution of the mentally retarded attempted to repeal its legislation.[58] In addition, some states purporting to allow the execution of mentally retarded inmates had not actually carried out such an execution in decades.[59] Finally, between the *Penry* decision in 1989 and *Atkins* in 2002, only five inmates with an IQ below seventy had been executed in the United States.[60]

These factors, coupled with the short time frame between *Penry* and *Atkins*, led the Court to conclude in *Atkins* that society in general viewed the mentally retarded as categorically less culpable than "normal" criminals.[61] This view was stated in both state legislation and state practice, and the Court concluded that a

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51. *See id.* at 318-20 (discussing the rationales of retribution and deterrence and their applicability to the imposition of the death penalty on the mentally retarded).

52. *See id.* at 321 (stating that the Court's independent evaluation of the issue was not in conflict with that of the legislatures); *see also infra* Part II.C (discussing *Stanford v. Kentucky*). It appears that, upon finding a national consensus, Justice Scalia, and possibly Chief Justice Rehnquist and Justice Kennedy, would end the inquiry and impose a categorical rule. *See Stanford*, 492 U.S. at 376 (stating that a procedure may be declared unconstitutional "only if there is a consensus").

53. *See* Penry v. Lynaugh, 492 U.S. 302, 334 (1989) (stating that Georgia and Maryland were the only two states which prohibited the execution of the mentally retarded before *Penry*).

54. *Id.*

55. *Atkins*, 536 U.S. at 314-15.

56. *Id.*

57. *Id.* at 315-16.

58. *Id.*

59. *Id.* at 316.

60. *Id.*

61. *Id.* at 315-16; *see also id.* at 318 n.24 (citing additional evidence that mentally retarded criminals may be less culpable as a class than "normal" criminals).

national consensus opposed to the execution of the mentally retarded did indeed exist.[62]

3. *Effect of National Consensus*

After finding that a national consensus against executing mentally retarded inmates existed, the Court concluded that this established society's belief that the mentally retarded can *never* have enough moral culpability to be subject to the death penalty.[63] To justify this conclusion, the Court looked at the two rationales for the death penalty, retribution and deterrence, and determined that these goals could not be met with respect to the mentally retarded.[64] If the death penalty does not meet one or both of the stated rationales, it becomes the "needless imposition of pain and suffering" and is thus unconstitutional.[65] This portion of the Court's reasoning is deemed to be the controversial "subjective" aspect of the Eighth Amendment test.[66]

Retribution necessarily depends on culpability.[67] Since the death penalty is not imposed on the "average murderer,"[68] and since the mentally retarded murderer cannot be more culpable than the "average murderer," it follows logically that the death penalty cannot be imposed on the mentally retarded murderer, at least using retribution as the theory of punishment.[69]

Capital punishment as a deterrent can only be effective when the murder is premeditated and deliberate.[70] Due to cognitive and behavioral impairments suffered by the mentally retarded, they posses a diminished capacity to

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62. *Id.* at 316. The Court also looked at other factors, including stances against these executions taken by the American Bar Association, the American Psychological Association, religious communities, and even the world community. *Id.* at 316 n.21. Furthermore, it was left to the states to determine who is actually mentally retarded. *Id.* at 317. Chief Justice Rehnquist vigorously dissented on this method of analysis. *Id.* at 321-23 (Rehnquist, C.J., dissenting).

63. *Id.* at 318-19.

64. *Id.* at 318-20.

65. *Id.* (quoting Enmund v. Florida, 458 U.S. 782, 798 (1982)).

66. *Id.* at 348-50 (Scalia, J., dissenting).

67. *See id.* at 319 (the retribution rationale is concerned with whether the offender gets his "just desserts" by the punishment imposed).

68. *Id.*

69. *Id.* at 319-20. The Court assumes that the mentally retarded murderer cannot be as culpable as the average murderer, presumably through its "national consensus" finding in which it concludes that society has determined that culpability is necessarily decreased for the mentally retarded murderer.

70. *Id.* at 319 (quoting *Enmund*, 458 U.S. at 799).

"premeditate" and "deliberate" prior to committing a murder.[71] Therefore, they cannot be deterred from committing what is essentially an "impulse" murder.[72]

Thus, because the mentally retarded lack the sufficient cognitive and behavioral aspects needed to trigger either death penalty rationale, the imposition of the death penalty is excessive and violates the Eighth Amendment's proscription against excessive punishment.[73] Therefore, the Court felt compelled to follow the national consensus against executing the mentally retarded.[74]

As additional support for its new categorical rule, the Court noted that the general lack of capacity of the mentally retarded led it to believe that "the death penalty will be imposed in spite of factors which may call for a less severe penalty."[75] Among other things, the Court noted that mentally retarded defendants make poor witnesses, cannot effectively assist counsel at trial, and may be less persuasive in offering evidence to be considered in mitigation.[76] Additionally, offering the fact of mental retardation as a mitigating factor may actually hurt the case for a reduced sentence because a jury may determine that factor actually indicates a likelihood of future dangerousness.[77] These findings, however, were dicta, as the Court's holding did not purport to rest upon the determination of these facts.[78]

4. Conclusion

The Court's two-part reasoning in *Atkins* consisted of (1) determining whether a national consensus against executing mentally retarded defendants existed, and (2) if such a consensus existed, whether the Court, in its own independent evaluation, agreed with the consensus.[79] This independent evaluation included an evaluation of whether the death penalty, as applied to the mentally retarded, advanced the overall deterrence and retribution rationales of the death

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71. *See id.* at 320 (stating that mentally retarded defendants have "cognitive and behavioral impairments" such as "the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, [and] to control impulses").

72. *See id.* at 319-20 (noting that the deterrent as to "normal" criminals would not be affected by this result. The Court, however, did not discuss the issue of whether a mentally retarded defendant had the requisite abilities to be convicted of first degree murder).

73. *See id.* at 318-20 (considering the national consensus and the rationales for the death penalty of deterrence and retribution, and concluding that the execution of mentally retarded defendants violates the Eighth Amendment).

74. *Id.* As mentioned, the majority's test went a step further than determining the existence of a national consensus. Because the majority test had room for "subjective" viewpoints, the lack of retribution or deterrence supported the national consensus and compelled the majority to go along with the national consensus. *Id.*

75. *Id.* at 320 (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)).

76. *Id.* at 320-21.

77. *Id.*

78. *Id.*

79. *See supra* Parts II.B.1-3 (describing the Court's reasoning in *Atkins*).

penalty.[80] Apparently, the issue of whether a national consensus existed was a threshold matter, and if no consensus was found, the Court would not have proceeded to conduct its own evaluation of the merits.[81]

Thus, applying the national consensus test articulated in *Penry*, the Court reached a different result from *Penry* in the face of a newly found national consensus.[82]

C. Stanford v. Kentucky

In order to advance the argument that the Supreme Court will overrule *Stanford v. Kentucky* upon granting certiorari to a future defendant, it would be appropriate to briefly discuss the Court's reasoning in *Stanford*. Since *Stanford*, the Supreme Court has not granted certiorari to a sixteen or seventeen-year-old defendant challenging his or her death sentence as excessive punishment under the Eighth Amendment.

In *Stanford*, decided in 1989, the Court upheld the death sentences of both a sixteen-year-old and a seventeen-year-old petitioner.[83] Kevin Stanford was convicted of a murder he committed in Kentucky in 1981 when he was seventeen years old.[84] He was sentenced to death, and his sentence was affirmed by the Supreme Court of Kentucky.[85] Heath Wilkins was also sentenced to death for murder.[86] The murder Wilkins was convicted of occurred in 1985, when he was sixteen years old.[87] His death sentence was affirmed by the Missouri Supreme Court.[88]

The issue in *Stanford*, similar to the issue in *Atkins*, was whether a class of inmates, in this case juveniles above the age of fifteen, could be executed in accord with the Eighth Amendment.[89] Justice Scalia, writing for the Court,[90] stated that the juvenile petitioners could argue either that (1) the execution of juveniles was unconstitutional when the Bill of Rights was adopted or (2)

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80. *See supra* Part II.B.3 (considering the appropriateness of imposing the death penalty on the mentally retarded based on the rationales of deterrence and retribution).

81. *See id.* at 328 (Rehnquist, C.J., dissenting) (stating that "[t]here are strong reasons for limiting our inquiry into" national consensus). Chief Justice Rehnquist concluded that no national consensus existed and did not consider any "subjective" question. His view is in line with Justice Scalia's reasoning in *Stanford v. Kentucky*, 492 U.S. 361 (1989). *See infra* Part II.C (discussing *Stanford v. Kentucky*).

82. *See supra* Part II.A-B (discussing *Penry* and *Atkins*).

83. *Stanford*, 492 U.S. at 380.

84. *Id.* at 365-66.

85. *Id.* at 366.

86. *Id.* at 367.

87. *Id.*

88. *Id.* at 368.

89. *Stanford*, 492 U.S. at 368. As stated, the *Stanford* case was the consolidated appeal of a sixteen-year-old and a seventeen-year-old defendant. The age difference of the petitioners made no difference to the outcome of the case.

90. Justices Brennan, Blackmun, Marshall, and Stevens dissented. *Id.* at 382-405.

execution of juveniles has become unconstitutional under "evolving standards of decency."[91] At the time of the adoption of the Bill of Rights, sixteen and seventeen-year-olds were executed, so the petitioners were left to argue under the "evolving standards of decency" test.[92] The inquiry under "evolving standards of decency" is whether state legislatures have condemned the practice in issue.[93] This objective inquiry is identical to the one used in *Penry* and *Atkins*.[94] After examining the actions of state legislatures, the Court concluded that a "national consensus" against executing juveniles aged sixteen and seventeen did not exist.[95]

Of the thirty-seven death penalty states in 1989, nineteen did not impose a minimum age by statute.[96] Combining these states with states that imposed sixteen or seventeen as a minimum age,[97] it was theoretically possible that sixteen-year-olds could be executed in twenty-two of the thirty-seven death penalty states and that seventeen-year-olds could be executed in twenty-five of the thirty-seven death penalty states.[98] Because approximately half of the death penalty states permitted (or at least did not prohibit by statute) the execution of sixteen and seventeen-year-olds, the Court concluded that the practice of executing juveniles was not "unusual" and therefore not proscribed by the Eighth Amendment.[99] In concluding its analysis, the Court noted that "punishment is either 'cruel *and* unusual . . .' or it is not."[100] The Court held that, absent a legislation-based national consensus forbidding the execution of juveniles, petitioners' death sentences were not in violation of the Eighth Amendment.[101]

Unlike the *Atkins* Court, the Court in *Stanford* did not look further than state legislation in determining whether a national consensus against these executions existed.[102] The *Stanford* petitioners had argued that, because juveniles were

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91. *See Stanford*, 492 U.S. at 368-69 (determining that, because defendants could not make the historical argument based on the Bill of Rights, they were only left with the option of arguing that their executions would violate "evolving standards of decency").

92. *Id.*

93. *Id.* at 369-70.

94. *See supra* Part II.A (discussing the test applied in *Penry*); Part II.B.1 (discussing the analysis in *Atkins*).

95. *Stanford*, 492 U.S. at 380.

96. *Id.* at 371 n.3.

97. It is unconstitutional to execute anybody who was under the age of sixteen at the time of the commission of the punishable crime. Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).

98. *See Stanford*, 492 U.S. at 370 (stating that, of the thirty-seven states that permit the death penalty, fifteen refuse to impose that sentence on sixteen-year-olds, and twelve refuse to impose it on seventeen-year-olds); *see also id.* at 371 (concluding that the state legislation present did not establish the degree of national consensus sufficient to hold the death penalty unconstitutional as applied to juveniles).

99. *Id.*

100. *See id.* at 378 (noting that petitioners theoretically need to persuade the American people, and not the Supreme Court, as the Court's role is limited to identifying the "evolving standards of decency," not determining what they should be).

101. *Id.* at 380.

102. *See supra* notes 48-50 and accompanying text (describing some of the other factors considered by the Court in *Atkins*).

treated so differently from non-juveniles in other areas of the law, a consensus could be implied from examining these laws, including laws regarding driving, drinking alcohol and voting.[103] The Court rejected this implied consensus argument however, reasoning that the criminal justice system provided an individualized determination of culpability for punishment, whereas the law in these other areas merely judged juveniles "in gross," not looking at individual cases.[104] Thus, under the Court's reasoning, some juveniles would have sufficient capacity to drive, vote, and drink alcohol if these privileges were granted individually rather than in gross.[105] Similarly, some juveniles would have sufficient culpability to be sentenced to death.[106]

The Court could have stopped when it concluded that a national consensus did not exist.[107] However, the Court addressed and rejected the petitioners' final argument, that executing juveniles failed to meet both the deterrence and the retribution rationales of the death penalty.[108]

The Court rejected the petitioners' deterrence/retribution argument,[109] concluding that the Equal Protection Clause of the Fourteenth Amendment, not the Eighth Amendment, would apply if the penological goals of capital punishment failed to apply to a particular class of inmates.[110] Because the parties did not make an Equal Protection Clause argument, the Court did not reach the merits of this argument, although it noted that only rational basis review would apply to such a classification.[111] The last part of the Court's opinion, rejecting the deterrence/retribution arguments, was dicta however, and it represented the views of only four Justices.[112]

Justice O'Connor concurred, applying her two-part test from *Thompson v. Oklahoma*,[113] reasoning that, in the absence of a national consensus, states do not need to impose a minimum age for execution in their respective death penalty statutes.[114] The second part of her two-part test, considering minimum age

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103. *Stanford*, 492 U.S. at 374.

104. *Id.* at 374-75.

105. *Id.*

106. *See id.* at 375 (noting, however, that age was always to be used as a mitigating factor at sentencing).

107. *See supra* Part II.B (discussing the analysis in *Atkins*).

108. *Stanford*, 492 U.S. at 377-78.

109. Justice O'Connor did not join this part of the Court's opinion. *Id.* at 364; *see also id.* at 380-82 (providing Justice O'Connor's concurring opinion). Thus, this part of the opinion is a plurality view.

110. *Id.* at 378.

111. *See id.* (noting that a Fourteenth Amendment argument, even if made, would likely fail because such a classification would be rationally related to legitimate state interests).

112. *Id* The four Justices were Scalia, White, Kennedy, and Chief Justice Rehnquist.

113. *See* Thompson v. Oklahoma, 487 U.S. 815, 848 (1988) (commencing Justice O'Connor's concurring opinion); *see also infra* Part II.E (discussing that opinion); *Stanford*, 492 U.S. at 380 (O'Connor, J., concurring) (describing the two-part test).

114. *See Stanford*, 492 U.S. at 380 (O'Connor, J., concurring) (claiming that illustrating specificity or lack thereof is not a constitutional problem when no national consensus exists).

requirements for states to impose the death penalty, was not triggered because Justice O'Connor agreed with the Court that a national consensus against executing juveniles, the first part of the inquiry under her test, did not exist.[115]

Against this backdrop, it is clear that without a national consensus, as evidenced by state legislatures, the imposition of the death penalty on a particular class of inmates is not "cruel and unusual" punishment under the Eighth Amendment. Although the Justices may disagree on what actually *constitutes* a national consensus,[116] the test is not disputed. What is disputed is whether, upon finding a consensus, subjective views of the Justices should determine whether the consensus should be followed.[117] Nonetheless, the national consensus test, deemed to mark the "evolving standards of decency that mark the progress of a maturing society,"[118] is the key in analyzing claims under the "cruel and unusual" clause of the Eighth Amendment.

D. In re Stanford

The Supreme Court did not see the last of petitioner Kevin Stanford after it upheld his death sentence in 1989. On October 21, 2002, Stanford petitioned the Court for a writ of habeas corpus.[119] This petition was denied, with Justice Stevens filing a dissenting opinion joined by Justices Souter, Ginsburg, and Breyer.[120]

One argument advanced by Justice Stevens in dissent was that, in light of *Atkins*, the Court needed to re-open the issue of whether juveniles as a class had the requisite culpability to be executed.[121] He also relied heavily on Justice Brennan's dissent in *Stanford v. Kentucky*,[122] which accepted petitioners' argument that, because society treats juveniles so differently in all other areas of life, it should also withhold the death penalty as a punishment for crimes committed as a juvenile.[123] Justice Brennan had argued that society treated juveniles differently because their cognitive reasoning abilities and empathy have

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115. *Id.* at 381 (O'Connor, J., concurring).

116. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 322 (2002) (Rehnquist, C.J., dissenting) (Chief Justice Rehnquist, along with Justices Thomas and Scalia, did not find a national consensus to exist in *Atkins* while the majority did find a national consensus to exist).

117. *See supra* notes 48-50 and accompanying text (describing the dispute concerning this subjective component of the inquiry).

118. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

119. *In re* Stanford, 537 U.S. 968 (2002).

120. *Id.* at 968-72 (Stevens, J., dissenting). Justice Stevens wrote the majority opinion in *Atkins* and was joined by these other three Justices, as well as Justices O'Connor and Kennedy, in that opinion. *Atkins*, 536 U.S. at 305.

121. *In re Stanford*, 537 U.S. at 971-72 (Stevens, J., dissenting).

122. Stanford v. Kentucky, 492 U.S. 361, 382, 405 (1989) (Brennan, J., dissenting).

123. *In re Stanford*, 537 U.S. at 969-71 (Stevens, J., dissenting).

not yet developed fully.[124] Therefore, because they lack such abilities, they can never have enough culpability to justify the imposition of the death penalty.[125]

The main argument of Justice Stevens, however, was that since the 1989 *Stanford* decision, a national consensus against executing juveniles had developed, and thus the Court was obligated to re-open the issue on petitioner Stanford's writ of habeas corpus.[126] In the years following the original *Stanford* decision, four state legislatures had banned juvenile executions,[127] and a fifth state banned juvenile executions by judicial decision.[128] Whether the actions of these five states, coupled with the pre-existing legislation of other states *actually* constitutes a consensus will be discussed in Part III.

Although the writ of habeas corpus was denied, Justice Stevens's dissent was significant for a number of reasons. First, it was joined by three other Justices,[129] and with four votes the Court will grant certiorari in almost all cases.[130] It is logical to assume that Justices Stevens, Souter, Ginsburg, and Breyer would vote to grant certiorari to a juvenile defendant sentenced to death in a state court. Thus the Court would need to decide on the merits whether executing juveniles was indeed prohibited by the Eighth Amendment by re-opening the national consensus issue as applied to juveniles.[131]

A second significance of Justice Stevens's dissent is that it showed that a national consensus may exist against executing juveniles and that, since the original *Stanford* decision, more states had banned such executions.[132] As discussed earlier, finding a national consensus is vital to determine whether, under evolving standards of decency, a punishment is cruel and unusual and thus proscribed by the Eighth Amendment.[133]

Although some Justices may disagree on what exactly constitutes a "national consensus,"[134] it appears that Justices Kennedy and O'Connor are more willing to find such a consensus than their colleagues Chief Justice Rehnquist and Justices Scalia and Thomas. Justice Kennedy did *not* find a consensus in *Stanford* and

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124. *Stanford v. Kentucky*, 492 U.S. at 394-96 (Brennan, J., dissenting).

125. *Id.* (Brennan, J., dissenting).

126. *In re Stanford*, 537 U.S. at 971-72 (Stevens, J., dissenting).

127. *Id.* at 969-70 (Stevens, J., dissenting). These states are Indiana, Montana, New York, and Kansas.

128. *Id.* at 969 (Stevens, J., dissenting). Washington's Supreme Court held that juveniles could no longer be executed in Washington in *State v. Furman*, 858 P.2d 1092, 1103 (Wash. 1993).

129. *In re Stanford*, 537 U.S. at 968.

130. *See* ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 261-62 (6th ed. 1986) (discussing the history of the "Rule of Four" and how in certain circumstances the votes of only two or three Justices may be necessary to grant certiorari).

131. *See infra* Part III (discussing the question of whether there is such a consensus).

132. *In re Stanford*, 537 U.S. at 968-69, 971-72 (Stevens J., dissenting).

133. *See supra* Part II.B.2. and Part II.C (illustrating the Court's implementation of the national consensus test).

134. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002) (including a majority opinion asserting that there was a national consensus and two dissenting opinions disputing that assertion).

thus joined Justice Scalia's plurality opinion.[135] However, in *Atkins*, Justice Kennedy agreed with Justice Stevens and the majority that a consensus existed.[136] Justice O'Connor is the only Justice to vote with the majority in *Thompson*, *Stanford*, *Penry*, and *Atkins*.[137] However, because she joined the *Atkins* majority opinion but merely concurred in *Stanford*, it is reasonable to assume that she is more flexible than Chief Justice Rehnquist and Justices Scalia and Thomas, who seem hesitant to find a "consensus" unless a significant majority of states ban a certain type of punishment.[138] Justice O'Connor's "swing vote" is crucial in deciding whether a consensus exists and therefore deciding that executing juveniles is unconstitutional.

If Justice Stevens is correct in his determination that a consensus does exist,[139] it appears that the Court would have enough votes to overrule *Stanford*.

Of course, merely labeling something a "national consensus" and thus concluding that a punishment is barred by the Eighth Amendment's adherence to evolving standards of decency does not end the inquiry. Justice Stevens garnered three additional votes that agree with his view of a "consensus."[140] However, at least one other member of the Court would need to be convinced that a consensus did in fact exist for the Court to overrule *Stanford*. This member, I argue, is Justice O'Connor. It is appropriate therefore to determine whether a national consensus, *as viewed by Justice O'Connor*, exists to overrule *Stanford*.[141] To do this, it is important to look at her concurring opinion in *Thompson v. Oklahoma*.

E. Justice O'Connor's Concurrence in Thompson v. Oklahoma

In *Thompson*, fifteen-year-old William Wayne Thompson was convicted of first degree murder in the State of Oklahoma and subsequently sentenced to death.[142] On appeal, Thompson argued that a death sentence for a fifteen-year-old was cruel and unusual punishment barred by the Eighth Amendment.[143] The Oklahoma Court of Criminal Appeals disagreed, holding that, because Thompson

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135. Stanford v. Kentucky, 492 U.S. 361, 364 (1989).

136. *Atkins*, 536 U.S. at 305.

137. *Id.*; *Stanford*, 492 U.S. at 363; Penry v. Lynaugh, 492 U.S. 302, 306 (1989); Thompson v. Oklahoma, 487 U.S. 815, 817 (1988). Justice O'Connor's concurrence in *Thompson* is discussed in Part II.E, *infra*.

138. *See Atkins*, 536 U.S. at 321 (Rehnquist, C.J., dissenting); *id.* at 337 (Scalia, J., dissenting) (demonstrating that the dissenting opinions by Chief Justice Rehnquist and Justice Scalia emphasized that merely half of the death penalty states banning a punishment does not constitute a national consensus on the issue). Justice Thomas signed on with both opinions. *Id.* at 321, 337.

139. *See infra* Part III (discussing whether a consensus, shaped by *Atkins*, does exist).

140. *In re* Stanford, 537 U.S. 968, 968 (2002).

141. This of course assumes that Justices Stevens, Souter, Ginsburg, and Breyer will remain consistent with their positions taken in both *Atkins* and *In re Stanford*.

142. *Thompson*, 487 U.S. at 818-20.

143. Thompson v. State, 724 P.2d 780, 784 (Okla. Crim. App. 1986).

had been tried as an adult, any and all punishments applicable to adults could apply to him, including the death penalty.[144]

The Supreme Court in *Thompson*, much like the Courts in *Stanford* and *Atkins*, was very divided. Justice Stevens wrote the plurality opinion and was joined by Justices Marshall, Brennan, and Blackmun.[145] Justice Scalia dissented, joined by Chief Justice Rehnquist and Justice White.[146] Justice Kennedy did not participate.[147] Thus, had Justice O'Connor voted with the Scalia faction, the case would have split 4-4. However, she concurred in the judgment of the Court[148] and, as is often the case, her "swing vote" decided the outcome of the case.[149]

Although *Thompson* was decided before *Stanford, Penry,* and *Atkins*, the Court's reasoning in *Thompson* was similar to those later cases. Justice Stevens's plurality opinion was structured similarly to his majority opinion in *Atkins.* At issue in *Thompson* was whether the execution of an inmate who was fifteen years old at the time of the offense was unconstitutional as being cruel and unusual punishment.[150] The plurality found that a national consensus existed in favor of prohibiting such executions by looking at state capital punishment statutes and inferring that, because no state explicitly authorized the execution of a fifteen-year-old, a national consensus existed.[151] Similarly, as in *Atkins*, the plurality (authored by Justice Stevens, the only member of this plurality still on the Court) also concluded that executing such young inmates did not meet the goals of the death penalty, deterrence and retribution.[152]

Justice O'Connor's concurring opinion was based in large part on the finding of a national consensus.[153] Although she warned against accepting such a consensus as a matter of constitutional law,[154] Justice O'Connor would not have voted with the plurality had there not been a national consensus.[155]

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144. *Id.*

145. *Thompson v. Oklahoma*, 487 U.S. at 818.

146. *Id.* at 859 (Scalia, J., dissenting).

147. *Id.* at 817.

148. *Id.* at 848 (O'Connor, J., concurring in the judgment of the Court).

149. *See* Joan Biskupic, *Justice O'Connor and Affirmative Action*, WASH. POST, Oct. 5, 1997, at A01 (describing how Justice O'Connor normally votes with the "conservative" Justices, but strays enough to be considered a key "swing vote" on a variety of issues).

150. *Thompson v. Oklahoma*, 487 U.S. at 818-19.

151. *See id.* at 829 (limiting the Court's examination of legislation to states which had actually addressed the issue of whether or not there is a minimum age below which a juvenile could not, in accord with the Constitution, be executed. Those states which addressed the issue unanimously determined that no juvenile under sixteen could be executed).

152. *Id.* at 836-37; *see also supra* Part II.B.3 (discussing the *Atkins* Court's consideration of deterrence and retribution).

153. *Id.* at 849 (O'Connor, J., concurring).

154. *Id.* (O'Connor, J., concurring).

155. Because she did not find a national consensus to exist in *Stanford*, Justice O'Connor joined much of the majority opinion in that case. However, she wrote separately there to emphasize that if she found a consensus to exist in *Stanford*, she may have gone the other way. Therefore, the consensus issue, according to

Justice O'Connor's main disagreement with the plurality was that they decided the case on grounds that were too broad.[156] Oklahoma's death penalty statute, like similar statutes in many other states, did not set a minimum age below which no person could be executed.[157] Because fifteen-year-old defendants could be tried as adults for murder, it was thus possible for a fifteen-year-old to be executed in Oklahoma, and petitioner Thompson was therefore sentenced to death in accord with state law.[158]

The plurality held that, as a categorical rule, fifteen-year-olds could not constitutionally be executed.[159] Justice O'Connor agreed that petitioner Thompson's death sentence was unconstitutional, but did not want to go so far as to hold that, categorically, no fifteen-year-old could ever be executed under the Eighth Amendment.[160] Instead, her analysis focused on state death penalty legislation and, more specifically, death penalty states that imposed a minimum age for death sentences.[161] Every state which imposed a minimum age set that age at sixteen or above.[162] Thus, no state explicitly authorized the execution of fifteen-year-olds.[163] According to Justice O'Connor, this lack of express authorization in *any* state was enough of a consensus to meet her "threshold" and, if appropriate, would lead to her second inquiry: whether states must explicitly impose a minimum age in death penalty statutes.[164] Because the Oklahoma death penalty statute did not specify a minimum age, and because she found a sufficient consensus, Justice O'Connor voted with the plurality to strike down Thompson's death sentence.[165]

Justice O'Connor and in line with the rest of the Court, is a "threshold." *See* Stanford v. Kentucky, 492 U.S. 361, 380-81 (1989) (O'Connor, J., concurring) (discussing the absence of a national consensus).

156. *See Thompson*, 487 U.S. at 849 (O'Connor, J., concurring) (preferring to decide the broad question of whether any fifteen-year-old may ever constitutionally be executed another time and only with better "consensus" evidence).

157. *Id.* at 857 (O'Connor, J., concurring).

158. *Id.* (O'Connor, J., concurring) (stating that the imprecise Oklahoma statute was of "dubious constitutionality" because of its lack of careful consideration regarding a minimum age).

159. *Id.* at 838.

160. *Id.* at 855 (O'Connor, J., concurring).

161. *Id.* at 849-51 (O'Connor, J., concurring).

162. *Id.* at 849 (O'Connor, J., concurring).

163. *Id.* at 852 (O'Connor, J., concurring). At the time *Thompson* was decided, eighteen states provided a minimum age for executions. *Id.* at 829. Oklahoma was one of nineteen states which "theoretically" could impose the death penalty on a fifteen-year-old because the statute was not specific as to age. *See supra* note 144 and accompanying text (discussing the Oklahoma Statute and the fact that, in Oklahoma, fifteen-year-olds could be tried as adults).

164. *See id.* at 858 (O'Connor, J., concurring). This second issue, whether a statute explicitly authorizing execution of fifteen-year-olds would be constitutional, was not before the Court and thus not addressed by Justice O'Connor. *Id.* (O'Connor, J., concurring). Oklahoma lost because of its imprecise statute and in light of the national consensus against executing fifteen-year-olds. *See supra* notes 153-58 and accompanying text (discussing Justice O'Connor's opinion concerning national consensus and Oklahoma's statute).

165. *Thompson*, 487 U.S. at 859 (O'Connor, J., concurring).

Justice O'Connor's test did not require a definite or concrete national consensus.[166] Although she leaned toward finding one there, she also made it clear that by no means was there a clear-cut consensus on this issue.[167] Only when a national consensus clearly *does not* exist may a state not explicitly provide a minimum age for imposing death sentences under Justice O'Connor's test.[168] Thus, the issue for Justice O'Connor was not whether executing fifteen-year-olds was unconstitutional but whether, with some evidence of a national consensus, a state's death penalty statute can be ambiguous as to the minimum age required for execution.[169] Once finding a consensus against executing a particular class of people, Justice O'Connor would not allow an ambiguous death penalty statute to be applied to that class.[170] Therefore, Justice O'Connor did not address the question of whether a state statute *explicitly* authorizing the execution of fifteen-year-olds could survive constitutional scrutiny.[171]

Justice O'Connor's complex method of reasoning set forth in *Thompson* and later applied in *Stanford* emphasized the need for precision and clarity in state legislation. In cases involving line-drawing for the possible execution of juvenile defendants, it is not difficult for a state to be precise in its legislation by stating that no person under the age of X can be executed. Because this degree of precision is lacking in the field of mentally retarded defendants, Justice O'Connor did not apply her *Thompson* test to the facts of *Atkins*. Rather, she simply signed on to the majority opinion.[172] However, when the Court grants certiorari for a *juvenile* defendant, it appears likely that Justice O'Connor will continue to apply the standard she laid out in *Thompson* to determine whether the practice of executing juveniles is indeed unconstitutional. Thus, because of the split on the Court,[173] a state which purports to authorize the execution of juveniles will likely have to pass her two-part *Thompson* test to maintain the ability to execute juveniles.[174]

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166. *See id.* at 848-49 (O'Connor, J., concurring) (asserting that a national consensus "likely does exist").

167. *Id.* at 857 (O'Connor, J., concurring).

168. *Id.* (O'Connor, J., concurring); Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (O'Connor, J., concurring).

169. *Thompson*, 487 U.S. at 857-58 (O'Connor, J., concurring). Compare this statement of the issue to *Stanford*, where according to Justice O'Connor it was *clear* that no national consensus existed as to sixteen and seventeen-year-olds. Thus, the issue of specificity in death penalty statutes was not reached. She made it clear, however, that she was applying her *Thompson* two-part test to *Stanford*. *Stanford*, 492 U.S. at 380-81 (O'Connor, J., concurring).

170. *Thompson*, 487 U.S. at 859 (O'Connor, J., concurring).

171. *See id.* at 858-59 (O'Connor, J., concurring) (stating that the plurality went too far in adjudicating this constitutional issue). *See supra* note 156 (noting that Justice O'Connor preferred to avoid the broader constitutional question).

172. Atkins v. Virginia, 536 U.S. 304, 305 (2002).

173. *See supra* Part II.D (discussing *In re Stanford*).

174. This assumes that Justice Kennedy will continue to vote with the conservative Justices in juvenile cases, creating a 4-4 situation in which Justice O'Connor would supply the tie-breaking vote.

Now I shall turn to the issue of whether a national consensus regarding the proscription of juvenile executions exists. To do this, I will examine various state legislation.

III. NATIONAL CONSENSUS AGAINST JUVENILE EXECUTIONS?

Prior to the Supreme Court's 1989 *Stanford v. Kentucky* decision, twelve of thirty-seven[175] death penalty states prohibited the execution of juvenile defendants.[176] This number of states was held in *Stanford* to be insufficient evidence of a national consensus against executing juveniles, and the death sentence of two juveniles was upheld.[177]

As pointed out in Justice Stevens's dissent in *In re Stanford*,[178] four death penalty states have enacted legislation after 1989 banning the execution of juveniles.[179] Thus, sixteen of the thirty-eight death penalty states now prohibit the execution of juveniles by statute.[180]

This number of states banning the execution of juveniles is close to the number of states, eighteen, which had banned the execution of the mentally retarded before *Atkins v. Virginia*.[181] Although state legislation is the most "objective" factor in determining the existence of a national consensus,[182] a decision by the Supreme Court of Washington banning the execution of juveniles would also likely be considered "objective evidence" of that state's position on this issue. Thus, the number of death penalty states expressly prohibiting the execution of juveniles may be seventeen, which is one less than the number of states held to be a national consensus in *Atkins*.[183]

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175. In 1994, Kansas became the thirty-eighth state to authorize capital punishment. *See* Death Penalty Information Center, Kansas, *at* http://www.deathpenaltyinfo.org/article.php?scid=11&did=502 (last visited Oct. 21, 2003) (copy on file with the *McGeorge Law Review*) (stating that Kansas reenacted the death penalty on April 22, 1994); *see also* Death Penalty Information Center, State by State Death Penalty Information, *at* http://www.deathpenalty-info.org/article.php?scid=11&did=121 (last visited Oct. 21, 2003) (copy on file with the *McGeorge Law Review*) (indicating "[t]here are currently [thirty-eight] states with the death penalty").

176. Stanford v. Kentucky, 492 U.S. 361, 370 (1989).

177. *See supra* Part II.C (indicating the holding and reasoning in *Stanford*).

178. *See supra* Part II.D (discussing *In re Stanford* and Justice Stevens's dissenting opinion therein).

179. *See supra* Part II.D.

180. Washington has not enacted legislation banning the death penalty for juveniles but has outlawed the practice by judicial decision. *See supra* note 128 (discussing the fact that Washington's Supreme Court has prohibited the execution of juveniles in that state). Thus Washington would be the seventeenth death penalty state to prohibit juvenile executions.

181. *See supra* Part II.B.2 (discussing the determination in *Atkins* that a national consensus opposed to the execution of the mentally retarded did exist based on the increasing number of states prohibiting such executions).

182. Penry v. Lynaugh, 492 U.S. 302, 331 (1989).

183. *See* Atkins v. Virginia, 536 U.S. 304, 314-15 (2002) (discussing state legislation prohibiting the execution of the mentally retarded).

In addition, four more death penalty states prohibit the execution of sixteen-year-olds.[184] Thus, nineteen states ban the execution of sixteen-year-olds by statute and two more states ban the execution of sixteen-year-old by judicial decision. Therefore, a total of twenty-one states ban the execution of sixteen-year-olds, which is *greater* than the consensus found in *Atkins*.[185]

The movement towards banning the execution of juveniles is very similar to the post-*Penry* movement in state legislatures banning the execution of the mentally retarded.[186] According to Justice Stevens, this is sufficient evidence of a national consensus to overrule *Stanford v. Kentucky* and introduce a categorical rule banning the execution of juveniles.[187] Thus Justice O'Connor and her *Thompson* test are critical; if she agrees with Justice Stevens, then *Stanford v. Kentucky* will be overruled. I will next argue that Justice O'Connor will indeed find that executing juveniles under the age of eighteen is unconstitutional, giving the Court the majority it needs to overrule *Stanford v. Kentucky*.

IV. APPLYING THE "O'CONNOR TEST"

In accordance with all Eighth Amendment cases, the "threshold" issue is whether a national consensus, as evidenced by objective factors, exists regarding the execution of juveniles.[188] Justice O'Connor would likely find evidence that a consensus exists, much like she did in her *Thompson* concurrence.[189] Therefore, the consensus issue would be resolved, and Justice O'Connor would proceed to the second part of her test.[190] Because seventeen death penalty states prohibit the execution of all juveniles, and twenty-one prohibit the execution of juveniles under the age of seventeen, it would be hard to argue that evidence of a national consensus does not exist.[191] This standard, it seems, is not a high one, and, as Justice O'Connor noted in her *Thompson* concurrence, it would therefore be unconstitutional to execute juveniles under a statute that "specifies no minimum age."[192] Indeed, in her concurring opinion in *Thompson*, Justice O'Connor noted

184. These states are: Georgia (GA. CODE ANN. § 17-9-3 (1997)); North Carolina (N.C. GEN. STAT. § 14-17 (1988)); Texas (TEX. PENAL CODE ANN. § 8.07(c) (2002)); and Florida (Brennan v. State, 754 So. 2d 1, 6 (Fla. 1999)).

185. *See supra* Part II.B.2 (discussing the national consensus found in *Atkins*).

186. *See supra* Part II.B.2 (discussing the increasing number of states that had enacted legislation prohibiting the execution of the mentally retarded).

187. *See supra* Part II.D (discussing Justice Stevens's dissenting opinion in *In re Stanford*). Justice Stevens's view is joined by Justices Ginsburg, Souter, and Breyer. *In re* Stanford, 537 U.S. 968, 968 (2002) (Stevens, J., dissenting).

188. *See supra* Part II.E (discussing Justice O'Connor's opinion in *Thompson v. Oklahoma*).

189. Thompson v. Oklahoma, 487 U.S. 815, 858 (1988) (O'Connor, J., concurring).

190. *See supra* Part II.E (describing Justice O'Connor's two-part test).

191. *See Thompson*, 487 U.S. at 857-58 (O'Connor, J., concurring); *see also supra* Part II.E (discussing Justice O'Connor's opinion in *Thompson v. Oklahoma*).

192. *Thompson*, 487 U.S. at 857-58 (O'Connor, J., concurring).

that there was "significant affirmative evidence of a national consensus."[193] As noted earlier, merely some evidence of a national consensus suffices for Justice O'Connor to proceed to the second part of her test, whether the statute must be precise.[194]

Justice O'Connor went out of her way to state that she did not find a clear-cut consensus in *Thompson*.[195] In the case of a new juvenile defendant, however, there is more than merely *some* evidence of a national consensus. As mentioned earlier,[196] the legislative "consensus" against executing juveniles is sixteen out of thirty-eight states. Washington's Supreme Court decision makes it seventeen out of thirty-eight death penalty states that outlaw the execution of juveniles.[197] In *Thompson*, the mere lack of express authorization in any state for executing fifteen-year-olds sufficed as a consensus, although not a clear-cut one, for Justice O'Connor.[198] With respect to a juvenile petitioner, Justice O'Connor would be faced with a consensus situation very similar to *Atkins*, where she signed on to Justice Stevens's majority opinion.[199] In *Atkins*, the Court found without hesitation that a national consensus existed against executing the mentally retarded.[200] It is very likely that Justice O'Connor will also find a consensus to exist when faced with a similar situation in the juvenile arena. Finally, because Justice O'Connor did not concur but merely signed on to Justice Stevens's majority opinion,[201] she found that the *Atkins* majority reached the correct result regarding the consensus issue. It is reasonable to assume that Justice O'Connor will find more than merely "affirmative evidence" of a national consensus in the juvenile context, with a similar number of states prohibiting the punishment in question, and will, instead, find a "clear cut" consensus as she did in *Atkins*.

In *Thompson*, after finding a consensus, Justice O'Connor concluded that Thompson's death sentence must be vacated because the Oklahoma statute did not provide a specific "floor," or minimum age, below which no person could be executed.[202] Because the consensus was not clear-cut in *Thompson*, and because the Oklahoma statute did not provide a floor, Justice O'Connor did not reach the issue of whether a statute which *did* explicitly authorize the execution of fifteen-year-olds would pass constitutional muster.[203] Under the juvenile situation here, however, this issue must be reached. As stated above, it is likely that the

193. *Id.* at 858 (O'Connor, J., concurring).

194. *See supra* Part II.E (describing Justice O'Connor's two-part test).

195. *Thompson*, 487 U.S. at 848-49, 857 (O'Connor, J., concurring).

196. *See supra* Part III (discussing states' legislation prohibiting the execution of juveniles).

197. *See supra* note 128 (discussing the fact that the Washington Supreme Court has prohibited the execution of juveniles in that state).

198. *Thompson*, 487 U.S. at 848-49, 857 (O'Connor, J., concurring).

199. *See supra* Part II.B.2 (discussing the determination that a national consensus was present in *Atkins*).

200. Atkins v. Virginia, 536 U.S. 304, 317 (2002).

201. *Thompson*, 487 U.S. at 848 (O'Connor, J., concurring).

202. *Id.* at 857-58 (O'Connor, J., concurring).

203. *Id.* at 855 (O'Connor, J., concurring).

consensus regarding juvenile defendants is much stronger than the one found in *Thompson* and, more importantly, Justice O'Connor will view the consensus at issue here as a stronger or more clear-cut one.

An appeal to the Supreme Court regarding the constitutionality of juvenile executions must necessarily come from a state which does not prohibit such executions. Twenty-one states permit the execution of seventeen-year-olds,[204] and seventeen of these states also permit the execution of sixteen-year-olds.[205] Eleven states have no minimum age in their death penalty statutes.[206]

A. Juvenile Appeal from a "Non-Precise State"

Assuming that a juvenile defendant appeals from one of these eleven "non-precise" states, the issue for Justice O'Connor would be similar to the one in *Thompson*.[207] If a seventeen-year-old petitioner is before the Court, there would be occasion to hold that all juvenile executions were unconstitutional. However, if a sixteen-year-old is granted certiorari, under *Thompson*, Justice O'Connor would apparently hesitate in holding that all juvenile executions were prohibited by a national consensus.[208]

This would be a different situation than the one which faced the Court in *Thompson*. As mentioned above, the consensus is much stronger here.[209] In fact, more states prohibit the execution of sixteen-year-olds (twenty-one) than prohibited the execution of the mentally retarded before *Atkins* (eighteen).[210] Moreover, there is only a one state difference between pre-*Atkins* states that had legislation banning the execution of the mentally retarded (eighteen) and the number of states which prohibit the execution of seventeen-year-olds (seventeen). This is much more conclusive "evidence" of a national consensus than that presented to the Court in *Thompson*.[211]

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204. Necessarily, the four states which have determined seventeen to be the minimum age have done so explicitly by either statute or judicial decision. *See supra* note 184 (listing the four states). Otherwise, the states' laws concerning capital punishment would be ambiguous as to age and would thus be considered as allowing the execution of sixteen-year-olds.

205. Of course, sixteen is the minimum constitutional age at which a person may be executed. *Thompson*, 487 U.S. at 838.

206. *See* Death Penalty Information Center, Age Requirements for the Death Penalty and the Execution of Juveniles, *at* http://www.deathpenaltyinfo.org/article.hp?scid=27&did=203#agereqs (last visited Oct. 21, 2003) (copy on file with the *McGeorge Law Review*). The eleven states are Arizona, Arkansas, Delaware, Idaho, Louisiana, Mississippi, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Utah.

207. *See supra* Part II.E (discussing Justice O'Connor's opinion in *Thompson*).

208. *See supra* note 156 and accompanying text (indicating that Justice O'Connor wished to decide these cases on the narrowest possible grounds).

209. *See supra* note 166 (asserting that some evidence of a national consensus would suffice for Justice O'Connor to proceed to the second part of her two part test).

210. *See supra* Part III (weighing the likelihood of the existence of a national consensus opposed to the execution of juveniles).

211. *See supra* Part II.E (discussing Justice O'Connor's opinion in *Thompson*).

Therefore, consistent with her joining the *Atkins* majority, it is likely that Justice O'Connor will hold that juvenile death sentences, under ambiguous or "non-precise" death penalty statutes, are unconstitutional.[212] This would be the case even if a sixteen-year-old defendant was before the Court, and it would not be inconsistent with Justice O'Connor's *Thompson* concurrence. As the overwhelming trend of state legislatures has been moving towards the prohibition of juvenile executions, it is apparent that a national consensus is actually developing in favor of prohibiting juvenile executions. In *Thompson*, Justice O'Connor said that, absent affirmative and specific legislative evidence regarding an emerging consensus, the Court should be hesitant when deciding the issue of whether or not a consensus does exist.[213] Here, there is much more evidence than was present in *Thompson*, and a reasonable inference can be made that Justice O'Connor would go along with the Stevens faction[214] and hold that, because of the strength of the consensus, *all* juvenile executions are prohibited under a non-precise statute regardless of whether a sixteen or seventeen-year-old defendant is before the Court.

B. Juvenile Appeal from a "Precise State"

Assuming that a juvenile defendant appeals from one of the ten "precise" states,[215] the issue left open in Justice O'Connor's concurring opinion in *Thompson* must be reached because of the strength of the national consensus. A stronger consensus requires closer scrutiny; this was the result in *Atkins*.[216]

As discussed earlier,[217] important factors in the *Atkins* analysis included the number of states outlawing the execution of the mentally retarded and the overwhelming trend in state legislatures outlawing these executions.[218] The trend is similar here, as discussed by Justice Stevens in his *In re Stanford* dissent.[219] Since *Stanford v. Kentucky*, four state legislatures[220] and one state supreme

212. This position would also be consistent with Justice O'Connor's concurrence in *Thompson*. *See supra* Part II.E (discussing that opinion).

213. Thompson v. Oklahoma, 487 U.S. 815, 848-49 (1988) (O'Connor, J., concurring).

214. Justice Stevens, along with Justices Souter, Ginsburg, and Breyer. *See supra* Part II.D (discussing the dissent written by Justice Stevens and joined by Justices Souter, Ginbsburg, and Breyer in *In re Stanford*).

215. "Precise state" being defined as the states with seventeen as the minimum age for execution by statute, the state with seventeen as the minimum age by judicial decision, and the states with sixteen as the minimum age by statute.

216. *See supra* Part II.B.2 (discussing the existence of a national consensus in *Atkins*).

217. *See supra* Part II.B.1 (describing the analysis to be undertaken in such a case).

218. *See supra* Part II.B.2 (discussing the *Atkins* Court's considerations of legislation trends opposing the execution of juveniles).

219. *In re* Stanford, 537 U.S. 968, 968-69, 971-72 (2002) (Stevens, J., dissenting); *see also supra* Part II.D (discussing Justice Stevens's dissent).

220. *See supra* note 127 and accompanying text (discussing that four state legislatures have banned the execution of juveniles since *Stanford v. Kentucky*, and listing those states).

court[221] have outlawed the execution of all juveniles. Another state has outlawed the execution of sixteen-year-olds by supreme court decision.[222] In this time period, no state has lowered its minimum execution age.[223]

These trends, combined with the numerical similarities between state laws concerning the execution of juveniles and the mentally retarded in *Atkins*, lead to the conclusion that specificity alone is *not* sufficient to save the statutes of the five states which specifically authorize execution of sixteen-year-olds and the four states which specifically authorize the execution of seventeen-year-olds. The evolving standards of decency test commands that, upon finding a national consensus against a type of punishment, that punishment must be held unconstitutional provided that the Justices accept that consensus.[224] This is true regardless of any degree of specificity or precision in a state statute.

In *Penry*, Justice O'Connor wrote the majority opinion and found no national consensus.[225] In *Stanford*, Justice O'Connor concurred because she did not find a national consensus to exist.[226] In *Thompson*, as discussed above, Justice O'Connor concurred while finding "affirmative evidence of a national consensus."[227] The only case involving the execution of juveniles or the mentally retarded where Justice O'Connor found a clear-cut national consensus was *Atkins*.[228] Alas, the only case in which Justice O'Connor did not file an opinion was also *Atkins*.[229] Because of her tendency to make her own statements in this line of cases, it is certainly reasonable to infer that Justice O'Connor did not concur in *Atkins* because she finally found the majority's consensus analysis as an acceptable national consensus. Although *Atkins* dealt with the mentally retarded, a similarly strong national consensus against executing juveniles should persuade Justice O'Connor to accept the consensus.

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221. *See supra* note 128 and accompanying text (discussing the case in which the Washington Supreme Court declared that the execution of juveniles in Washington is prohibited).

222. Brennan v. State, 754 So. 2d 1, 6 (Fla. 1999).

223. Although Kansas became a "death penalty state" in 1994, its minimum age for execution is eighteen. KAN. STAT. ANN. § 21-4622 (1995); *see also supra* note 175 (discussing Kansas's adoption of the death penalty in 1994).

224. This is the test applied in *Atkins*. *See supra* Part II.B.3 (describing the application of that test). It is reasonable to assume that the Stevens faction will go along with the consensus. Although Justice O'Connor has not expressed her views as to whether "subjective" views should be considered, it appears likely that she would hold against juvenile executions once the national consensus issue has been determined. *See supra* Part II.B.2 (discussing the finding of a national consensus in *Atkins*); *see also supra* Part II.E (discussing Justice O'Connor's opinion in *Thompson*).

225. *See supra* Part II.A (discussing Justice O'Connor's opinion for the Court in *Penry*).

226. *See supra* Part II.C (discussing *Stanford v. Kentucky* and Justice O'Connor's opinion concurring in part and concurring in the judgment of the Court).

227. *Thompson v. Oklahoma*, 487 U.S. 815, 858 (1988) (O'Connor, J., concurring); *see supra* Part II.E (discussing Justice O'Connor's opinion concurring in the judgment of the Court in *Thompson v. Oklahoma*).

228. *See supra* Part II.B (discussing *Atkins v. Virginia*).

229. Atkins v. Virginia, 536 U.S. 304 (2002).

Four Supreme Court Justices favor outlawing juvenile executions.[230] A fifth, Justice O'Connor, will likely join this block of four to hold that executing a juvenile is unconstitutional as violating the Eighth Amendment's proscription of "cruel and unusual" punishment.

V. CONCLUSION

The sad reality of contemporary life in America is that kids kill. From the rash of school shootings in the past decade, including the Columbine massacre, to the more recent sniper shootings in Washington D.C.,[231] Americans have witnessed numerous tragedies caused by children under the age of eighteen. At the center of this issue is a legal question: What is the appropriate punishment for these juvenile offenders? As discussed earlier,[232] as little as fifteen years ago a fifteen-year-old was sentenced to death. Up until that point and the *Thompson* decision, it was not unconstitutional for such a sentence to be rendered and for such a punishment to be carried out. Today, although fifteen-year-olds are safe from the death penalty,[233] sixteen and seventeen-year-olds are not. Juveniles of these ages, including convicted sniper John Malvo, are more likely to commit such devastating and tragic crimes as they approach the age of eighteen. They are in a sort of "twilight zone" between childhood and adulthood, which is eighteen in the eyes of the law. Until the Supreme Court rules otherwise, or until every state has banned juvenile executions, these sixteen and seventeen-year-old offenders remain subject to the death penalty in a number of states.

Although *Atkins*, on its face, does not appear to help these juveniles in terms of avoiding the death penalty, a closer look reveals that *Atkins* may be just what juveniles needed to do so. The reasoning of *Atkins* is similar to the reasoning in the two most recent juvenile death penalty cases to come before the Supreme Court, *Thompson* and *Stanford*.[234] *Atkins* was decided thirteen years after the Court in *Penry* determined that a national consensus against executing the mentally retarded did not exist.[235] The *Atkins* Court reached a different result than the *Penry* Court in the face of an emerging national consensus against executing the mentally retarded.[236] Similarly, the Court will be faced with an emerging national consensus against executing juveniles in a future case involving a juvenile defendant. Thus, applying the same reasoning as was applied in *Atkins*, the Court will likely find that, indeed, a national consensus has emerged against

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230. *See supra* Part II.D (discussing Justice Stevens's dissent in *In re Stanford*, in which Justice Souter, Ginsburg, and Breyer joined).

231. *See supra* Part I (discussing John Malvo, one of the defendants convicted for the D.C. sniper shootings, and who was seventeen years old at the time of his arrest).

232. *See supra* Part II.E (discussing *Thompson v. Oklahoma*).

233. Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).

234. *See supra* Part II.B (discussing *Atkins* and the reasoning therein).

235. *See supra* Part I (discussing *Atkins* and its sharp departure from *Penry*).

236. *See supra* Part II.B (discussing *Atkins* and the emerging national consensus).

executing juveniles. Therefore, the Court will likely follow suit and hold that executing juveniles violates the Eighth Amendment's "evolving standards of decency test." This result follows from Justice Stevens's dissent from denial of habeas corpus in *In re Stanford*[237] and Justice O'Connor's concurrence in *Thompson,*[238] giving the Court the votes it needs to hold juvenile executions unconstitutional.[239]

The issue of juvenile executions is a controversial one, and reasonable people, even reasonable Supreme Court Justices, may disagree as to the constitutionality and morality of such a practice. Regardless of one's personal views, however, this is an issue which the Supreme Court will confront soon, and the practice of executing juveniles in America will likely come to an end in the near future.

237. *See supra* Part II.D (discussing Justice Stevens's dissent in *In re Stanford*).

238. *See supra* Part II.E (discussing Justice O'Connor's opinion in *Thompson*).

239. *See supra* Part IV (considering the analysis and possible outcome resulting from the application of Justice O'Connor's two-part test to such a case).

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